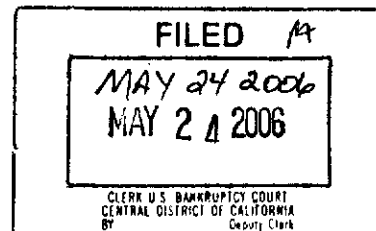


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UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

SANTA ANA DIVISION

In re

LLOYD MYLES RUCKER,

Debtor.

Case No.: SA 06-10195 JR
Chapter 7 Case
Adv. No. 8:06-ap-01259-JR

DR. RONALD CUNNING, an individual and
as trustee for the RONALD CUNNING
D.D.S., INC. PROFIT SHARING PLAN
AND TRUST and the CUNNING FAMILY
TRUST,

Plaintiff,

vs.

LLOYD MYLES RUCKER,

Defendant.

**NOTICE OF MOTION AND MOTION FOR
SUMMARY JUDGMENT PURSUANT TO
FEDERAL RULE OF CIVIL PROCEDURE
56; MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

Hearing Information:

DATE: June 28, 2006
TIME: 1:30 p.m.
CTRM: 5A

[Statement of Uncontroverted Facts and
Conclusions of Law and Request for
Judicial Notice Filed Concurrently
Herewith]

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1 TO THE HONORABLE JOHN E. RYAN, UNITED STATES BANKRUPTCY JUDGE,
2 THE OFFICE OF THE UNITED STATES TRUSTEE, THE DEBTOR AND HIS
3 COUNSEL, AND ANY OTHER PARTIES IN INTEREST:

4 PLEASE TAKE NOTICE that on June 28, 2006, at 1:30 p.m. in Courtroom 5A of
5 the Ronald Reagan Federal Building and United States Courthouse located at 411 W.
6 Fourth Street, Santa Ana, California 92701, the Court will hold a hearing on the motion of
7 plaintiffs Ronald A. Cuning, D.D.S., individually and on behalf of the Ronald Cuning
8 D.D.S., Inc. Profit Sharing Plan and Trust and the Cuning Family Trust, for Summary
9 Judgment pursuant to Federal Rule of Civil Procedure 56 (the "Motion").

10 PLEASE TAKE FURTHER NOTICE that pursuant to Local Bankruptcy Rule 9013-
11 1(e), any party who opposes the Motion must, no later than twenty-one (21) calendar
12 days prior to the hearing on the Motion, serve and file a separate concise "statement of
13 genuine issues" with responding papers setting forth all material facts as to which it is
14 contended there exists genuine issues required to be litigated, and referencing each fact
15 to the evidence which establishes the genuine issue to be litigated.

16 PLEASE TAKE FURTHER NOTICE that failure to timely respond to the Motion
17 may be deemed by the Court to be a consent to the granting of the relief sought in the
18 Motion.

19
20 DATED: May ___, 2006

Respectfully submitted,

WEILAND, GOLDEN,
SMILEY, WANG EKVALL & STROK, LLP

21
22
23 By:

KYRA E. ANDRASSY
Attorneys for Ronald A. Cuning,
D.D.S., individually and on behalf of
the Ronald A. Cuning, D.D.S. Inc.,
Profit Sharing Plan and Trust and the
Cuning Family Trust

1 **MOTION**

2 Plaintiffs Ronald A. Cunning, D.D.S., individually and on behalf of the Ronald
3 Cunning D.D.S., Inc. Profit Sharing Plan and Trust and the Cunning Family Trust
4 (collectively, the "Plaintiffs"), hereby move the Court for summary judgment, determining
5 that the state court judgments obtained by the Plaintiffs are entitled to collateral estoppel
6 effect and that they are nondischargeable under 11 U.S.C. §§ 523(a)(2)(A), (a)(4), and
7 (a)(6). In support of the Motion, the Plaintiffs submit the following memorandum of points
8 and authorities, the Statement of Uncontroverted Facts and Conclusions of Law in
9 support of the Motion, the Request for Judicial Notice and exhibits thereto, and such
10 other and further evidence and argument as may be submitted at or prior to the hearing
11 on the Motion, and respectfully represent as follows:

12
13 **I. INTRODUCTION**

14 In 1997, after a multi-week trial, a jury rendered verdicts against the Debtor and in
15 favor of the Plaintiffs that collectively totaled \$3.1 million based on the jury's findings that
16 the Debtor committed fraud, breach of fiduciary duty, and conversion. The verdicts
17 included punitive damages based on the jury's findings that the Debtor's conduct was
18 oppressive, malicious, and fraudulent. The judgments are final. Through this Motion, the
19 Plaintiffs request that the Court give the state court judgments collateral estoppel effect
20 and find that the judgments are nondischargeable under 11 U.S.C. §§ 523(a)(2)(A),
21 (a)(4), and (a)(6).

22
23 **II. BACKGROUND FACTS**

24 Dr. Cunning is a dentist who also invests in real estate. Dr. Cunning was
25 introduced to the Debtor and the Debtor's former wife, Lori Rucker, by a local real estate
26 broker named Christopher Bennett. Based on representations by the Debtor about
27 several successful real estate projects that he had been involved in, Dr. Cunning agreed
28 to form two joint ventures with the Debtor to develop and complete two real estate

1 projects in Newport Beach, California. See Statement of Uncontroverted Facts No. 1.
2 Accordingly, Dr. Cuning, on behalf of the Ronald Cuning D.D.S., Inc. Profit Sharing
3 Plan and Trust (the "Profit Sharing Plan"), and the Debtor formed a joint venture to
4 develop and complete a real estate project on 15th Street in Newport Beach. See
5 Statement of Uncontroverted Facts No. 2. The second project was on 16th Street in
6 Newport Beach, and the joint venture for that project was formed by the Debtor and
7 Dr. Cuning on behalf of the Cuning Family Trust. See Statement of Uncontroverted
8 Fact No. 3. In connection with the real estate projects, the joint ventures obtained
9 construction loans that Dr. Cuning individually personally guaranteed. See Statement
10 of Uncontroverted Facts No. 4.

11 After entering into the joint venture agreements with the Debtor and providing the
12 funding and loans required of him, Dr. Cuning began to experience difficulty in obtaining
13 financial information and information about the status of the two projects from the Debtor.
14 Dr. Cuning was then contacted by Christopher Bennett, who claimed that a written
15 agreement existed between he and the Debtor pursuant to which Mr. Bennett was to
16 receive a percentage interest in any project that Dr. Cuning pursued with the Debtor.
17 Mr. Bennett sued the Debtor and Dr. Cuning in Orange County Superior Court (the
18 "State Court") to enforce the agreement against the Debtor. During this investigation,
19 Dr. Cuning discovered that the Debtor had engaged in fraud, breach of fiduciary duty,
20 and conversion. The State Court ultimately ordered an accounting and appointed a
21 retired judge to act as a referee.

22 The investigation culminated with the State Court's findings that the Debtor had
23 wrongfully removed funds from the two construction loans guaranteed by Dr. Cuning
24 and had used the funds to benefit himself personally, to benefit his wife, to fund other
25 construction projects, and for an unjustified claim for supervision fees. See Statement of
26 Uncontroverted Facts No. 5. The State Court also found that the Debtor had defrauded
27 the Cuning Family Trust out of \$100,000 through a double escrow, and that the Debtor
28 had diverted funds, falsified records, overcharged the joint ventures, and concealed the

1 records and the facts of these wrongful transactions. See Statement of Uncontroverted
2 Facts No. 6. The State Court found that the Debtor owed \$1,157,641 to the joint
3 ventures in severable amounts to be determined by a jury. See Statement of
4 Uncontroverted Facts No. 7.

5 After a jury trial, the jury rendered its verdicts against the Debtor with special
6 findings, including fraud and deceit, breach of fiduciary duty, fraudulent inducement, and
7 conversion.¹ Specifically, the jury rendered the following verdicts: (1) a general verdict in
8 favor of Dr. Cuning individually in the amount of \$391,097 and a special verdict
9 assessing punitive damages in favor of Dr. Cuning individually in the amount of
10 \$500,000 (together, the "Cuning Judgment"); (2) a general verdict in favor of the Profit
11 Sharing Plan in the amount of \$574,631 and a special verdict assessing punitive
12 damages in favor of the Profit Sharing Plan in the amount of \$500,000 (together, the
13 "Profit Sharing Plan Judgment"); and (3) a general verdict in favor of the Family Trust in
14 the amount of \$583,009 and a special verdict assessing punitive damages in favor of the
15 Family Trust in the amount of \$500,000 (together, the "Family Trust Judgment")(the
16 Cuning Judgment, the Profit Sharing Plan Judgment, and the Family Trust Judgment
17 are collectively referred to as the "Judgments"). See Statement of Uncontroverted Facts
18 Nos. 8, 13, 14, 20, 21, 27. The jury found that the Debtor's conduct was oppressive,
19 malicious, and fraudulent, and these findings formed the basis for the punitive damage
20 awards. See Statement of Uncontroverted Facts Nos. 12, 19, and 26. The judgments
21 are all final.

22 The Debtor filed his voluntary chapter 7 bankruptcy petition on October 12, 2005,
23 and the Plaintiffs timely filed their complaint under 11 U.S.C. § 523.
24
25
26
27

28 ¹ The jury also found that the conduct forming the basis for the judgments was a breach of contract,
although that finding is not at issue in this Motion.

1 **III. LEGAL STANDARD FOR SUMMARY JUDGMENT**

2 A party moving for summary judgment must show "that there is no genuine issue
3 of material fact and that the Movant is entitled to judgment as a matter of law." Fed. R.
4 Bankr. P. 7056(c). Summary judgment is mandated "against a party who fails to make a
5 showing sufficient to establish the existence of an element essential to that party's case,
6 and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett,
7 477 U.S. 317, 322 (1986).

8 "Once the moving party meets this burden, the non-moving party must designate
9 specific facts showing that there is a genuine issue for trial." Hayes v. Palm Seedlings
10 Partners-A (In re Agricultural Research and Tech. Group, Inc.), 916 F.2d 528, 533-34
11 (9th Cir. 1990)(citations omitted). In establishing a triable issue of fact, a responding
12 party must do more than present a scintilla of evidence. Rather, the evidence presented
13 must be sufficient to allow a reasonable fact-finder to find in the respondent's favor. See
14 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

15
16 **IV. THE JUDGMENTS ARE ENTITLED TO COLLATERAL ESTOPPEL EFFECT,**
17 **AND THEY SHOULD BE FOUND TO BE NONDISCHARGEABLE UNDER**
18 **11 U.S.C. §§ 523(a)(2)(A), (a)(4), and (a)(6)**

19 The purpose of collateral estoppel is to avoid repetitious litigation. In applying
20 collateral estoppel, federal courts are required to "give a state-court judgment the same
21 preclusive effect as would be given that judgment under the law of the state in which the
22 judgment was rendered." Younie v. Gonya (In re Younie), 211 B.R. 367, 373 (9th Cir.
23 BAP 1997)(quoting Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 81 (1984)).
24 Collateral estoppel applies in nondischargeability proceedings. See Grogan v. Garner,
25 498 U.S. 279, 284-85 n.11, 111 S.Ct. 654, 658, 112 L.Ed.2d 755 (1991). The preclusive
26 effect of a state court judgment in a subsequent bankruptcy proceeding is determined by
27 the preclusion law of the state in which the judgment was issued. See Gayden v.
28

1 Nourbakhsh, 67 F.3d 798, 800 (9th Cir. 1995). Here, the Judgments were issued in
2 California, so California law on collateral estoppel applies.

3 The application of collateral estoppel in California requires that:

4 (1) The issue sought to be precluded from relitigation must be
5 identical to that decided in a former proceeding;

6 (2) The issue must have been actually litigated in the former
7 proceeding;

8 (3) It must have been necessarily decided in the former
9 proceeding;

10 (4) The decision in the former proceeding must be final and
11 on the merits; and

12 (5) The party against whom preclusion is sought must be the
13 same as, or in privity with, the party to the former proceeding.

14 Younie, 211 B.R. at 373 (citation and internal quotation marks omitted).

15 **A. The Cunning Judgment Is Nondischargeable Under 11 U.S.C.**
16 **§§ 523(a)(2)(A) and (a)(6)**

17 **1. The Cunning Judgment Is Nondischargeable Under**
18 **11 U.S.C. § 523(a)(2)(A)**

19 Section 523(a)(2)(A) excepts from discharge any debt "for money, property, an
20 extension, renewal, or refinancing of credit, to the extent obtained by . . . false pretenses,
21 a false representation, or actual fraud" 11 U.S.C. § 523(a)(2)(A). This section
22 requires "only the fact of an adverse fraud judgment, and nothing more . . . for a debt to
23 be nondischargeable." Muegler v. Bening, 413 F.3d 980, 984 (9th Cir. 2005). All
24 damages resulting from a debtor's fraud, including punitive damages, are
25 nondischargeable under this section. See Cohen v. De La Cruz, 523 U.S. 213, 223, 118
26 S.Ct. 1212, 1219 (1998).

27 In September 1996, the state court signed its general verdict, awarding Cunning,
28 in his individual capacity, damages of \$391,037. See Statement of Uncontroverted Facts

1 No. 8; General Verdict, attached as Exhibit "2."² In awarding Dr. Cunning damages of
2 \$391,037, the jury found that the Debtor had made a representation to Dr. Cunning as to
3 a past or existing material fact, that the representation was false, that the Debtor knew
4 that the representation was false when he made it and made it with the intention of
5 defrauding Dr. Cunning, that Dr. Cunning acted in reliance upon the truth of the
6 representation and was justified in doing so, and that the Debtor's misrepresentation
7 caused Dr. Cunning to suffer damages of \$391,037. See Statement of Uncontroverted
8 Facts No. 9; Special Findings Fraud and Deceit, attached as Exhibit "3." In a separate
9 Special Finding, the jury also found that the Debtor had concealed or suppressed a
10 material fact with the intention of defrauding Dr. Cunning, that Dr. Cunning was unaware
11 of that fact when he acted and would have acted differently if he had known the truth,
12 and that the Debtor's concealment of the fact caused Dr. Cunning damages of
13 \$391,097.00. See Statement of Uncontroverted Facts No. 10; Special Findings Fraud
14 (Inducement), attached as Exhibit "4." In addition to the compensatory damages of
15 \$391,097, the jury also awarded Dr. Cunning \$500,000.00 in punitive damages. See
16 Statement of Uncontroverted Facts No. 13; Special Verdict (Punitive Damages), attached
17 as Exhibit "7." The punitive damages were awarded in part based on the jury's finding
18 that the Debtor's conduct was fraudulent within the meaning of California Civil Code
19 ("CCC") § 3294. See Statement of Uncontroverted Facts No. 12; Special Findings (Clear
20 and Convincing Evidence; Punitive Damages), attached as Exhibit "6." For the reasons
21 set forth below, the Cunning Judgment is entitled to collateral estoppel effect and is
22 nondischargeable under § 523(a)(2)(A).

23 The first element in determining whether it is appropriate to give a judgment
24 collateral estoppel effect is whether the issue sought to be precluded from relitigation is
25 identical to that decided in the earlier proceeding. All that is needed to find an identity of
26 issues under § 523(a)(2)(A) is the fact of an adverse fraud judgment. See Muegler, 413
27

28 ² All references to exhibits in this Motion are to the exhibits that are attached to the Request for
Judicial Notice submitted in connection with the Motion.

1 F.3d at 984. Because the jury found that the Debtor had committed both actual fraud
2 and fraud in the inducement and that this conduct constituted fraud within the meaning of
3 CCC § 3294, there is an identity of issues, and the first element of collateral estoppel is
4 satisfied.

5 Second, the issue of whether the Debtor incurred the Cuning Judgment as a
6 result of fraud was actually litigated in the State Court. The Debtor was represented by
7 the law firm of Turner, Cooper & Reynolds, and the matter was tried to a jury over
8 several weeks and after four years of trial preparation, resulting in the Judgments. The
9 Debtor was aware that the trial was proceeding and has not contended otherwise. This
10 is more than sufficient under California law to establish the element that the issue was
11 actually litigated.³

12 Third, the Cuning Judgment was entered after the jury expressly found that the
13 Debtor had defrauded Dr. Cuning and included a punitive damages award that was
14 based in part on a finding that the Debtor's conduct was fraudulent. Accordingly, the
15 issue of fraud was necessarily litigated, and this element is satisfied.

16 Last, the Cuning Judgment is final and non-appealable, and the Debtor and
17 Dr. Cuning were parties to the litigation leading to the Cuning Judgment and are the
18 parties before this Court. Thus, the fourth and fifth elements of collateral estoppel are
19 satisfied.

20 Because all of the elements of collateral estoppel are easily met here and there
21 are no genuine issues of material fact, there is no reason for the same issues to be
22 relitigated by the same parties, and the Cuning Judgment is nondischargeable under
23 11 U.S.C. § 523(a)(2)(A).

27 ³ In California, even a default judgment is entitled to collateral estoppel effect as long as the
28 defendant was personally served with the summons or had actual knowledge of the existence of the
litigation. See Cal-Micro, Inc. v. Cantrell (In re Cantrell), 329 F.3d 1119, 1124 (9th Cir. 2003). Not only was
the Cuning Judgment not the result of a default judgment, it was rendered only after a jury trial.

1 2. **The Cunning Judgment Is Nondischargeable Under**
2 **11 U.S.C. § 523(a)(6)**

3 Section 523(a)(6) excepts from discharge debts "for willful and malicious injury by
4 the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6).
5 This section is intended to except from discharge debts incurred as a result of a debtor's
6 intentional torts. See Kawaauhau v. Geiger (In re Geiger), 523 U.S. 57, 61-62, 118 S.Ct.
7 974, 977 (1998). The requirement of a willful injury "is met only when the debtor has a
8 subjective motive to inflict injury or when the debtor believes that injury is substantially
9 certain to result from his own conduct." In re Su, 290 F.3d 1140, 1142 (9th Cir. 2002). A
10 malicious act is a wrongful act, done intentionally, that necessarily causes injury, and is
11 done without just cause or excuse. Id. at 1147-48. All damages stemming from a willful
12 and malicious injury are nondischargeable under § 523(a)(6). See Britton v. Price (In re
13 Britton), 950 F.2d 602, 605-06 (9th Cir. 1991)(abrogated on other grounds by
14 Kawaauhau v. Geiger (In re Geiger), 523 U.S. 57 (1998))

15 As set forth above, the jury found that the Debtor had made a representation to
16 Dr. Cunning as to a past or existing material fact, that the representation was false, that
17 the Debtor knew that the representation was false when he made it and the Debtor made
18 it with the intention of defrauding Dr. Cunning, that Dr. Cunning acted in reliance upon
19 the truth of the representation and was justified in doing so, and that the Debtor's
20 misrepresentation caused Dr. Cunning to suffer damages of \$391,037. See Statement
21 of Uncontroverted Facts No. 9; Special Findings Fraud and Deceit, attached as
22 Exhibit "3." In a separate Special Finding, the jury also found that the Debtor had
23 concealed or suppressed a material fact with the intention of defrauding Dr. Cunning,
24 that Dr. Cunning was unaware of that fact when he acted and would have acted
25 differently if he had known the truth, and that the Debtor's concealment of the fact
26 caused Dr. Cunning damages of \$391,097.00. See Statement of Uncontroverted Facts
27 No. 10; Special Findings Fraud (Inducement), attached as Exhibit "4." In awarding
28 punitive damages of \$500,000, the jury also found that this same conduct was malicious,

1 oppressive, and fraudulent within the meaning of CCC § 3294. See Statement of
2 Uncontroverted Facts No. 12; Special Findings (Clear and Convincing Evidence; Punitive
3 Damages), attached as Exhibit "6."

4 In order to give the Cunning Judgment collateral estoppel effect and find that it is
5 nondischargeable under 11 U.S.C. § 523(a)(6), the Court must first find that there is an
6 identity of issues. As set forth above, under § 523(a)(6), there must be both a subjective
7 motive to injure and an intentional act that causes injury and that is done without just
8 cause or excuse in order for there to be a debt incurred by willful and malicious injury.
9 See Su, 290 F.3d at 1140-42, 1147-48. Both elements are easily satisfied here. In its
10 findings with respect to fraud, the jury found that the Debtor had made a false
11 representation about a material fact to Dr. Cunning and had concealed or suppressed a
12 material fact from Dr. Cunning, doing both with the intention of defrauding Dr. Cunning,
13 thereby causing Dr. Cunning damages of \$391,097. In addition, the jury found that the
14 Debtor had committed fraud within the meaning of CCC § 3294(a). CCC 3294 defines
15 "fraud" as "an intentional misrepresentation, deceit, or concealment of a material fact
16 known to the defendant with the intention on the part of the defendant of thereby
17 depriving a person of property or legal rights or otherwise causing injury." Cal. Civ. Code
18 § 3294(c)(3). Each of these findings satisfies the requirement of § 523(a)(6) that the
19 Debtor's conduct be done with the subjective motive to inflict injury and also be a
20 wrongful act, done intentionally, that necessarily causes injury, and that is done without
21 just cause or excuse. See Su, 290 F.3d at 1140-42, 1147-48; see also Molina v. Seror
22 (In re Molina), 228 B.R. 248, 251-52 (9th Cir. BAP 1998)(analyzing the Supreme Court's
23 decision in Geiger and holding that a judgment that included punitive damages for fraud
24 under CCC § 3294 was entitled to collateral estoppel effect and therefore
25 nondischargeable under § 523(a)(6)). In addition to the above, in awarding punitive
26 damages, the jury expressly found that the Debtor's conduct was oppressive, which is
27 defined as "despicable conduct that subjects a person to cruel and unjust hardship in
28 conscious disregard of that person's rights." Cal. Civ. Code § 3294(c)(2). This, too, is

1 sufficient to satisfy the requirement that the conduct be malicious. See Petralia v.
2 Jercich (In re Jercich), 238 F.3d 1202, 1209 (9th Cir. 2001). Accordingly, there is an
3 identity of issues and the first element of collateral estoppel is satisfied.⁴

4 Second, the issue of whether the Cuning Judgment was awarded as a result of
5 the Debtor's willful and malicious injury to the Debtor was actually litigated in the State
6 Court after a jury trial, so this element is met. Because the Cuning Judgment was
7 entered after the jury expressly found that the Debtor's conduct was intended to harm
8 Dr. Cuning and done without just cause or excuse, as required by § 523(a)(6), the third
9 requirement that the issue be necessarily decided is satisfied. Last, the Cuning
10 Judgment is final and non-appealable and the same parties that were involved in the
11 State Court are present before this Court, so the fourth and fifth elements of collateral
12 estoppel are satisfied.

13 Because all of the elements of collateral estoppel are satisfied and there are no
14 genuine issues of material fact, there is no reason for the parties to relitigate whether the
15 damages were awarded as a result of willful and malicious injury, and the Cuning
16 Judgment should be found to be nondischargeable under § 523(a)(6).⁵

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22 ⁴ In addition, the jury found that the Debtor had committed the tort of conversion by wrongfully
23 exerting dominion over Dr. Cuning's property, causing Dr. Cuning to suffer damages of \$391,097.00.
24 See Statement of Uncontroverted Facts No. 11; Special Findings Conversion, attached as Exhibit "5." In
25 California, conversion is an intentional tort that requires that the plaintiff "show an intention or purpose to
26 convert the goods and to exercise ownership over them, or to prevent the owner from taking possession of
his property." Collin v. American Empire Ins. Co., 21 Cal. App. 4th 787, 812 (1994). At least one court has
found that this is tantamount to a willful injury within the meaning of § 523(a)(6). See Leonard v. Guillory (In
re Guillory), 285 B.R. 307, 315-16 (Bankr. C.D. Cal. 2002).

27 ⁵ The jury also found that the same conduct giving rise to the Cuning Judgment constituted a
28 breach of the Debtor's fiduciary duty to Dr. Cuning. However, Dr. Cuning has been unable to obtain a
copy of this special finding from the State Court and counsel has been unable to locate it in time to submit it
with this motion. However, Dr. Cuning reserves the right to seek nondischargeability of the Cuning
Judgment under § 523(a)(4) in the future if it becomes necessary to do so.

1 **B. The Profit Sharing Plan Judgment Is Nondischargeable Under**
2 **11 U.S.C. §§ 523(a)(2)(A), (a)(4), and (a)(6)**

3 **1. The Profit Sharing Plan Judgment Is Nondischargeable**
4 **Under 11 U.S.C. § 523(a)(2)(A)**

5 In awarding the Profit Sharing Plan a judgment of \$574,631, the jury found that
6 the Debtor had made a representation to Dr. Cunning, in his capacity as trustee of the
7 Profit Sharing Plan, that the Debtor knew was false when he made it, that the Debtor
8 made the representation with the intention of defrauding the Profit Sharing Plan, that
9 Dr. Cunning (again in his capacity as the trustee of the Profit Sharing Plan, justifiably
10 relied on the representation, and that the misrepresentation caused the Profit Sharing
11 Plan damages of \$574,631. See Statement of Uncontroverted Facts No. 15; Special
12 Findings Fraud and Deceit, attached as Exhibit "9." The jury also found that the Debtor
13 intentionally concealed or suppressed a material fact with the intention of defrauding
14 Dr. Cunning, in his capacity as the trustee of the Profit Sharing Plan, that Dr. Cunning
15 was unaware of the fact when he acted on behalf of the Profit Sharing Plan, that
16 Dr. Cunning would have acted differently if he had known of the fact, and that the
17 concealment or suppression caused the Profit Sharing Plan damages of \$574,631.00.
18 See Statement of Uncontroverted Facts No. 16; Special Findings Fraud (Inducement),
19 attached as Exhibit "10." Because the jury found that the same conduct giving rise to the
20 fraud judgments was malicious, oppressive, and fraudulent within the meaning of CCC
21 § 3294(a), it also awarded the Profit Sharing Plan punitive damages of \$500,000. See
22 Statement of Uncontroverted Facts Nos. 19, 20; Special Findings (Clear and Convincing
23 Evidence; Punitive Damages), attached as Exhibit "6"; Special Verdict (Punitive
24 Damages), attached as Exhibit "13." As explained briefly below, the Profit Sharing Plan
25 Judgment is entitled to the same collateral estoppel effect as the Cunning Judgment and
26 should be determined to be nondischargeable under § 523(a)(2)(A).⁶

27 ⁶ Because both judgments are based on the same facts and are similarly worded, the Plaintiffs will
28 not repeat in detail the analysis contained in Section IV.A. of this Motion, although they did incorporate it by
 this reference.

1 The first element that must be satisfied in order to give the Profit Sharing Plan
2 Judgment collateral estoppel effect in this context is that there must be an identity of
3 issues. As with the Cunning Judgment, because the jury found that the Debtor
4 committed actual fraud and fraud in the inducement and that his conduct was fraudulent
5 within the meaning of CCC § 3294, there is an identity of issues and the first factor is
6 satisfied. See Muegler, 413 F.3d at 984.

7 The second element that must be satisfied is that the issue of whether the Debtor
8 incurred the Profit Sharing Plan Judgment as a result of fraud must have been actually
9 litigated in the State Court. As explained above, the judgment was entered after a jury
10 trial, and accordingly, this element is satisfied.

11 Third, the Profit Sharing Plan Judgment was entered after the jury found that the
12 Debtor had defrauded the Profit Sharing Plan, and included a punitive damages award
13 based in part on the jury's finding that the Debtor's conduct with respect to the Profit
14 Sharing Plan was fraudulent. Accordingly, the issue of fraud was necessarily litigated
15 and the third element is satisfied.

16 Last, the Profit Sharing Plan is also final and nonappealable, and both the Profit
17 Sharing Plan and the Debtor were parties to the litigation leading to the Profit Sharing
18 Plan Judgment and are the parties before the Court in this proceeding. The fourth and
19 fifth elements required to give the Profit Sharing Plan Judgment collateral estoppel effect
20 are therefore satisfied.

21 Because all of the elements of collateral estoppel are therefore satisfied and there
22 are no genuine issues of material fact, the issues do not need to be relitigated, and the
23 Profit Sharing Plan Judgment should be found to be nondischargeable under
24 § 523(a)(2)(A).

1 **C. The Profit Sharing Plan Judgment Is Nondischargeable Under**
2 **11 U.S.C. § 523(a)(4)**

3 Section 523(a)(4) excepts from discharge any debt "for fraud or defalcation while
4 acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. § 523(a)(4).
5 Whether a person is a "fiduciary" under § 523(a)(4) is an issue of federal law which
6 requires that "[t]he trust giving rise to the fiduciary relationship [] be imposed prior to any
7 wrongdoing; the debtor must have been a 'trustee' before the wrong and without
8 reference to it." Ragsdale v. Haller (In re Ragsdale), 780 F.2d 794, 796 (9th Cir. 1986).
9 This requirement is intended to eliminate constructive, resulting, or implied trusts. Id.
10 Although federal law defines the concept of a fiduciary, state law is relevant to determine
11 when a trust in a strict sense exists. Id. Parties to a joint venture owe each other a
12 fiduciary duty. Id. at 796-97 n. 3. All damages stemming from a breach of fiduciary duty,
13 including punitive damages, are nondischargeable. See Bugna v. McArthur (In re
14 Bugna), 33 F.3d 1054, 1059-60 (9th Cir. 1994).

15 Here, the State Court found that the Debtor and the Profit Sharing Plan were
16 parties to a joint venture and the jury found that the Debtor therefore owed a fiduciary
17 duty to the Profit Sharing Plan and breached that fiduciary duty, causing the Profit
18 Sharing Plan to suffer damages of \$574,631. See Statement of Uncontroverted Facts
19 Nos. 2, 17. Because this fiduciary duty is the same as that contemplated by § 523(a)(4),
20 there is an identity of issues, and the first element required to give the Profit Sharing Plan
21 Judgment collateral estoppel effect is met.

22 Second, the issue of whether the Debtor breached his fiduciary duty was actually
23 litigated in State Court because it was adjudicated after a jury trial. Third, the issue was
24 necessarily decided, as evidenced by the fact that there is a special finding that the
25 Debtor breached his fiduciary duty to the Profit Sharing Plan. Accordingly, this element
26 is met. Fourth, the Profit Sharing Plan long ago became a final and nonappealable
27 judgment, and the same parties that were parties to the matter before the State Court
28 are present before this Court.

1 Because all of the elements required to give the Profit Sharing Plan Judgment
2 collateral estoppel effect are satisfied, the Profit Sharing Plan Judgment should be found
3 to be nondischargeable under § 523(a)(4).

4 1. **The Profit Sharing Plan Judgment Is Nondischargeable**
5 **Under 11 U.S.C. § 523(a)(6)**

6 In connection with the Profit Sharing Plan Judgment, the jury found that the
7 Debtor had made a false representation of a material fact to Dr. Cunning in his capacity
8 as trustee of the Profit Sharing Plan, that the Debtor made the representation with the
9 intention of defrauding the Profit Sharing Plan, that the Profit Sharing Plan justifiably
10 acted in reliance on the truth of that representation, and that the misrepresentation
11 caused it damages of \$574,631. See Statement of Uncontroverted Facts No. 15;
12 Special Findings Fraud and Deceit, attached as Exhibit "9." The jury also found that the
13 Debtor had concealed or suppressed a material fact from the Profit Sharing Plan with the
14 intention of defrauding the Profit Sharing Plan, that Dr. Cunning, as trustee of the Profit
15 Sharing Plan, was unaware of the fact when he acted, that Dr. Cunning would have
16 acted differently if he had known of the concealed or suppressed fact, and that the
17 Debtor's concealment or suppression caused the Profit Sharing Plan to suffer damages
18 of \$574,631. See Statement of Uncontroverted Facts No. 16; Special Findings Fraud
19 (Inducement), attached as Exhibit "10." Additionally, in awarding the Profit Sharing Plan
20 punitive damages of \$500,000, the jury found that the same conduct was malicious,
21 oppressive, and fraudulent within the meaning of CCC § 3294. See Statement of
22 Uncontroverted Facts Nos. 19, 20.

23 In order to give the Profit Sharing Plan Judgment collateral estoppel effect and
24 find that it is nondischargeable under § 523(a)(6), the Court first must find that there is an
25 identity of issues. Section 523(a)(6) requires that the debt be incurred as a result of the
26 debtor's subjective motive to inflict injury or because the debtor believed that injury was
27 substantially certain to result from his conduct. See Su, 290 F.3d at 1142. The debt
28 must also be the result of a wrongful act, done intentionally, that necessarily causes

1 injury, and that is done without just cause or excuse. Id. at 1147-48. Both elements are
2 met here because the jury found that the Debtor made a false representation of a
3 material fact and also concealed or suppressed a material fact with the intention of
4 defrauding the Profit Sharing Plan, thereby causing it to suffer damages of \$574,631.
5 The jury also found that the Debtor committed fraud within the meaning of CCC § 3294,
6 which requires that the fraud occur "with the intention on the part of the defendant of
7 thereby depriving a person of property or legal rights or otherwise causing injury." Cal.
8 Civ. Code § 3294(c)(3). All three of these satisfy the requirement of § 523(a)(6) that the
9 Debtor's conduct be done with the subjective motive to inflict injury and that the act be
10 wrongful, done intentionally, necessarily cause injury, and be done without just cause of
11 excuse. See Su, 290 F.3d at 1140-42, 1147-48; Molina, 228 B.R. at 251-52). In
12 addition, the jury found that the Debtor's conduct with respect to the Profit Sharing Plan
13 was oppressive, which is also sufficient to satisfy the requirement that the conduct be
14 malicious. See Jercich, 238 F.3d at 1209. As a result, there is an identity of issues, and
15 the first requirement is met.⁷

16 The remaining elements required to give the Profit Sharing Plan Judgment
17 collateral estoppel effect are easily satisfied. First, the Profit Sharing Plan Judgment was
18 awarded as a result of the Debtor's willful and malicious injury after a jury trial in the
19 State Court, so the requirement that the issue be actually litigated is met. Next, the Profit
20 Sharing Plan Judgment was entered after the jury expressly found that the Debtor's
21 conduct was intended to harm the Profit Sharing Plan and was done without just cause
22 or excuse, so the third element that the issue be necessarily decided is satisfied. Last,
23 the Profit Sharing Plan Judgment is final and non-appealable and the same parties are
24 involved, so the fourth and fifth elements are satisfied.

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27 ⁷ In addition, the jury found that the Debtor had committed the tort of conversion with respect to the
28 Profit Sharing Plan. See Statement of Uncontroverted Facts No. 18; Special Findings Conversion, attached
as Exhibit "12." This may provide additional evidence that the Family Trust Judgment was the result of the
Debtor's willful and malicious injury. See Guillory, 285 B.R. at 315-16.

1 Because all of the elements of collateral estoppel are met and there are no
2 genuine issues of material fact, the Profit Sharing Plan Judgment is entitled to be given
3 collateral estoppel effect and should be found to be nondischargeable under § 523(a)(6).
4

5 **D. The Family Trust Judgment Is Nondischargeable Under 11 U.S.C.**
6 **§§ 523(a)(2)(A), (a)(4), and (a)(6)**

7 **1. The Family Trust Judgment Is Nondischargeable Under**
8 **11 U.S.C. § 523(a)(2)(A)**

9 In reaching its verdicts with respect to the Family Trust, the jury reached the same
10 conclusions that it did with respect to Dr. Cunning and the Profit Sharing Plan.
11 Specifically, the jury again found that the Debtor had made a false representation to
12 Dr. Cunning, in his capacity as trustee of the Family Trust, that the Debtor made the
13 misrepresentation with the intention of defrauding the Family Trust, that the Family Trust
14 justifiably acted in reliance on the truth of the representation, causing the Family Trust to
15 suffer damages of \$583,009. See Statement of Uncontroverted Facts No. 22; Special
16 Findings Fraud and Deceit, attached as Exhibit "15." The jury also found that the Debtor
17 had concealed or suppressed a material fact from Dr. Cunning in his capacity as the
18 trustee of the Family Trust with the intention of defrauding the Family Trust, that the
19 Family Trust would have acted differently if it had known of the concealed or suppressed
20 fact, and that the Debtor's concealment or suppression caused the Family Trust to suffer
21 damages of \$583,009. See Statement of Uncontroverted Facts No. 23; Special Findings
22 Fraud (Inducement), attached as Exhibit "16." Last, the jury found that the Debtor's
23 conduct with respect to the Family Trust was fraudulent within the meaning of CCC
24 § 3294, and awarded punitive damages of \$500,000 in favor of the Family Trust. See
25 Statement of Uncontroverted Facts Nos. 26 and 27; Special Findings (Clear and
26 Convincing Evidence; Punitive Damages) and Special Verdict (Punitive Damages),
27 attached as Exhibits "6" and "19," respectively. For the reasons set forth below, the
28

1 Family Trust Judgment is entitled to collateral estoppel effect and should be determined
2 to be nondischargeable under § 523(a)(2)(A).

3 The first element to determine whether it is entitled to collateral estoppel effect is
4 whether there is an identity of issues. Given the three separate adverse findings of fraud
5 detailed above, this element is easily satisfied. See Muegler, 413 F.3d at 984.

6 The second element is whether the issue was actually litigated in the State Court.
7 Because the Family Trust Judgment was rendered after a trial before a jury, this issue is
8 also met.

9 Third, the Family Trust Judgment was entered after the jury expressly found that
10 the Debtor had committed the torts of fraud and deceit and fraud in the inducement and
11 that the Debtor's conduct constituted fraud within the meaning of CCC § 3294. Because
12 these are express findings, the issue of fraud was necessarily litigated and the third
13 element is satisfied.

14 Last, the Family Trust Judgment is final and non-appealable, and the same parties
15 are involved.

16 Because all of the elements of collateral estoppel are satisfied, the Family Trust
17 Judgment is entitled to be given collateral estoppel effect and should be found to be
18 nondischargeable under § 523(a)(2)(A).

19 **2. The Family Trust Judgment Is Nondischargeable Under**
20 **11 U.S.C. § 523(a)(4)**

21 As explained above, § 523(a)(4) excepts from discharge debts incurred as a result
22 of a debtor's breach of fiduciary duty. Parties to a joint venture owe one another a
23 fiduciary duty. See Ragsdale, 780 F.2d at 796-97 n.3. Here, the State Court found that
24 the Debtor and the Family Trust were parties to a joint venture with respect to the real
25 estate project on 16th Street in Newport Beach, and the jury found that the Debtor
26 therefore owed the Family Trust a fiduciary duty and breached it. See Statement of
27 Uncontroverted Facts Nos. 3, 24; Special Findings Fiduciary Duty, attached as
28 Exhibit "17." Because this fiduciary duty is the same as that required by § 523(a)(4),

1 there is an identity of issues, and the first element required to give the Family Trust
2 Judgment collateral estoppel effect under § 523(a)(4) is satisfied.

3 The second element requires that the issue of whether the Debtor breached his
4 fiduciary duty have been actually litigated. Because the jury made this finding after a trial
5 that the Debtor was certainly aware of, this element is satisfied.

6 Third, the issue of whether the Debtor breached his fiduciary duty must have been
7 necessarily decided. This element is met because the jury made an express finding that
8 the Debtor breached his fiduciary duty to the Family Trust, causing it to suffer damages
9 of \$583,009. Last, the Family Trust Judgment is final and non-appealable, and the same
10 parties that were parties to the Family Trust Judgment are parties to this action.

11 Accordingly, the Family Trust Judgment is entitled to collateral estoppel effect and
12 should be determined to be nondischargeable under § 523(a)(4).

13 **3. The Family Trust Judgment Is Nondischargeable Under**
14 **11 U.S.C. § 523(a)(6)**

15 As explained in detail above, debts incurred as a result of a willful and malicious
16 injury by the debtor are nondischargeable under § 523(a)(6). See 11 U.S.C. § 523(a)(6).
17 Here, the jury found that the Debtor had made a false representation of a material fact to
18 Dr. Cunning in his capacity as trustee of the Family Trust, that the Debtor made the
19 misrepresentation with the intention of defrauding the Family Trust, that the Family Trust
20 justifiably relied on the truth of that representation, and that the misrepresentation
21 caused it damages of \$583,009. See Statement of Uncontroverted Facts No. 22;
22 Special Findings Fraud and Deceit, attached as Exhibit "22." The jury also found that the
23 Debtor had concealed or suppressed a material fact from Dr. Cunning, in his capacity as
24 trustee of the Family Trust, with the intention of defrauding the Family Trust, that the
25 Family Trust would have acted differently if it had known of the concealed or suppressed
26 fact, and that this concealment caused the Family Trust to suffer damages.
27 See Statement of Uncontroverted Facts No. 23; Special Findings Fraud (Inducement),
28 attached as Exhibit "16." Last, the jury found that the Debtor's conduct constituted fraud,

1 within the meaning of CCC § 3294, which requires that there be an "intention on the part
2 of the defendant of thereby depriving a person of property or legal rights or otherwise
3 causing injury." Cal. Civ. Code § 3294(c)(3); see Statement of Uncontroverted Facts
4 Nos. 26, 27. As with the Cunning Judgment and the Profit Sharing Plan Judgment, each
5 of these three findings satisfies the requirement of § 523(a)(6) that the Debtor's conduct
6 be done with the subjective motive to inflict injury and that the act be wrongful, done
7 intentionally, necessarily cause injury, and be done without just cause or excuse.
8 See Su, 290 F.3d at 1140-42, 1147-48; Molina, 228 B.R. at 251-52. In addition, the jury
9 also found that the Debtor's conduct with respect to the Family Trust was oppressive,
10 which is also sufficient to satisfy the requirement that the conduct be malicious. See
11 Jercich, 238 F.3d at 1209. Accordingly, there is an identity of issues, and the first
12 requirement is met.⁸

13 The remaining elements required to give the Family Trust Judgment collateral
14 estoppel effect are also satisfied. First, it was awarded after a jury trial in State Court, so
15 the requirement that the issue be actually litigated is met. Second, the Family Trust
16 Judgment was entered after the jury expressly found that the Debtor's wrongful conduct
17 was intended to injure the Family Trust and was done without just cause or excuse, so
18 the issue was necessarily decided. Last, the Family Trust Judgment is final and
19 non-appealable, and the same parties that were before the State Court are before this
20 Court.

21 Because each of the elements required to give the Family Trust Judgment
22 collateral estoppel effect under § 523(a)(6) are met, the Family Trust Judgment should
23 be found to be nondischargeable under § 523(a)(6).

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27 ⁸ In addition, the jury found that the Debtor had committed the tort of conversion with respect to the
28 Family Trust. See Statement of Uncontroverted Facts No. 25; Special Findings Conversion, attached as
Exhibit "18." This may provide additional evidence that the Family Trust Judgment was the result of the
Debtor's willful and malicious injury. See Guillory, 285 B.R. at 315-16.

1 **V. CONCLUSION**

2 Based on the foregoing, the Plaintiffs request that the Court find that the
3 Judgments are entitled to collateral estoppel effect and therefore nondischargeable
4 under § 523 as follows:

5 1. The Cuning Judgment is nondischargeable under 11 U.S.C.
6 §§ 523(a)(2)(A) and (a)(6); and

7 2. The Profit Sharing Plan Judgment is nondischargeable under 11 U.S.C.
8 §§ 523(a)(2)(A), (a)(4), and (a)(6); and


9 3. The Family Trust Judgment is nondischargeable under 11 U.S.C.
10 §§ 523(a)(2)(A), (a)(4), and (a)(6).

11
12 DATED: May 24, 2006

Respectfully submitted,

WEILAND, GOLDEN,
SMILEY, WANG EKVALL & STROK, LLP

13
14 By:


KYRA E. ANDROSSY
Attorneys for Dr. Ronald Cuning,
an individual and as trustee for the
Ronald Cuning D.D.S., Inc. Profit
Sharing Plan and Trust and the
Cuning Family Trust

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA,

3 COUNTY OF ORANGE

4 I am employed in the County of Orange, State of California. I am over the age of
5 18 and not a party to the within action; my business address is 650 Town Center Drive,
Suite 950, Costa Mesa, California 92626.

6 On May 24, 2006, I served the foregoing document described as **NOTICE**
7 **OF MOTION AND MOTION FOR SUMMARY JUDGMENT PURSUANT TO FEDERAL**
8 **RULE OF CIVIL PROCEDURE 56; MEMORANDUM OF POINTS AND AUTHORITIES**
IN SUPPORT THEREOF on the interested parties in this action by placing true copies
thereof enclosed in sealed envelopes addressed as follows:

9 see attached list

10 ☒ BY MAIL

11 ☐ I deposited such envelope in the mail at Costa Mesa, California. The
12 envelope was mailed with postage thereon fully prepaid.

13 ☒ I deposited such envelope with the firm for collection and processing. I am
14 "readily familiar" with the firm's practice of collection and processing
15 correspondence for mailing. It is deposited with U.S. postal service on that
16 same day with postage thereon fully prepaid at Costa Mesa, California in
the ordinary course of business. I am aware that on motion of the party
served, service is presumed invalid if postal cancellation date or postage
meter date is more than one day after date of deposit for mailing in
affidavit.

17
18 Executed on May 24, 2006, at Costa Mesa, California.

19 ☐ (State) I declare under penalty of perjury under the laws of the State of California
20 that the above is true and correct.

21 ☒ (Federal) I declare that I am employed in the office of a member of the bar of this
22 court at whose direction the service was made. I declare under the penalty of
perjury under the laws of the United States of America that the above is true and
correct.

23
24 Margaret Sciesinski
Type or print name

Margaret Sciesinski
Signature

Dr. Ronald Cunning (Family Trust) v. Lloyd Myles Rucker
Adv. No. 8:06-ap-01259 JR
523 Complaint List

SERVICE LIST:

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